U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0153 BLA

MICHAEL W. CHONCEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 01/17/2023
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2019-BLA-05921) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on April 20, 2018 and is before the Benefits Review Board for a second time.[1]

In his June 22, 2020 Decision and Order Awarding Benefits, the ALJ credited Claimant with 21.83 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further determined Employer did not rebut the presumption and awarded benefits.

On appeal, the Board affirmed the ALJ's findings that Claimant had 21.83 years of underground coal mine employment and was totally disabled and therefore invoked the Section 411(c)(4) presumption. *Choncek v. Keysone Coal Mining Corp.*, BRB No. 20-0398 BLA, slip op. at 2 n.2, 5 (Sept. 16, 2021) (unpub.). The Board further affirmed the ALJ's determination that Employer failed to disprove clinical pneumoconiosis but vacated his findings as to legal pneumoconiosis and disability causation. *Id.* at 7-9. Thus, the Board vacated the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and remanded the case for further consideration. *Id.* at 9.

On remand, the ALJ again found Employer failed to rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not disprove either legal pneumoconiosis or disability causation and thereby establish rebuttal of the Section

[1] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Choncek v. Keysone Coal Mining Corp.*, BRB No. 20-0398 BLA (Sept. 16, 2021) (unpub.).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

411(c)(4) presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not rebut the presumption that

[3] In this appeal, Employer again argues the ALJ erred in finding Claimant is totally disabled. Employer's Brief at 15-20. We note that despite the Board considering and rejecting this issue in Employer's prior appeal, the ALJ included nearly identical findings as to total disability on remand. *Choncek*, BRB No. 20-0398 BLA, slip op. at 3-5; Decision and Order on Remand at 24. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to reconsider our prior holding affirming the ALJ's total disability finding. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Choncek*, BRB No. 20-0398 BLA, slip op. at 5.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Claimant has legal pneumoconiosis or that no part of his total disability was caused by pneumoconiosis. Decision and Order on Remand at 16, 27-28.[6]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Basheda and Rosenberg.[7] Decision and Order on Remand at 16. Dr. Basheda diagnosed a mild restriction due to obesity and "intermittent asthma" that was unrelated to coal mine dust exposure. Employer's Exhibits 2 at 13-15, 6 at 13-14, 17, 19-20. Dr. Rosenberg determined any pulmonary impairments were due to Claimant's obesity and "hyperactive airways" or asthma and were unrelated to coal mine dust exposure. Employer's Exhibits 4 at 5-6, 7 at 16-19, 22-23. He further explained any further deterioration of lung function was due to "hyperactive airways" and obesity. Employer's Exhibit 4 at 6. The ALJ found the opinions of Drs. Basheda and Rosenberg entitled to little weight because they were insufficiently explained and inconsistent with the preamble to the 2001 revised regulations and, therefore, insufficient to satisfy Employer's burden of proof. Decision and Order on Remand at 16.

Employer contends the ALJ applied the wrong legal standard by requiring it to disprove the absence of any chronic lung disease in order to rebut the presumption of legal pneumoconiosis. Employer's Brief at 7. In addition, it contends the ALJ again erred in

[6] As the Board previously affirmed Employer's failure to disprove clinical pneumoconiosis, this precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Choncek*, BRB No. 20-0398 BLA, slip op. at 7.

[7] The ALJ noted Drs. Krefft, Celko, and Sood diagnosed legal pneumoconiosis and thus found their opinions do not aid Employer in rebutting the existence of legal pneumoconiosis. Decision and Order on Remand at 13-16. As Employer does not assert their opinions would aid it on rebuttal, we need not address Employer's argument that the ALJ failed to adequately consider their opinions and that their opinions are internally contradictory and based on Claimant's self-reported symptoms. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12-15.

rejecting the opinions of Drs. Basheda and Rosenberg based on the preamble to the revised regulations and in failing to adequately consider their specific explanations for why Claimant's asthma does not constitute legal pneumoconiosis. *Id.* at 9-11.

We reject Employer's assertion that the ALJ required it to disprove the *absence of any* chronic lung disease. Employer's Brief at 7 (emphasis added). The ALJ stated Employer is required to establish the absence of a chronic lung disease *arising out of* Claimant's coal mine employment.[8] Decision and Order on Remand at 16, *citing* 20 C.F.R. §718.201(a)(2). Further, the ALJ explained that coal mine dust exposure need not be the sole cause of a respiratory impairment. *Id.* at 16.

In addition, the ALJ permissibly discredited Drs. Basheda's and Rosenberg's opinions because he found neither adequately addressed why even if Claimant has asthma and is obese, his respiratory or pulmonary impairment is not significantly related to, or substantially aggravated by, the coal mine dust he was exposed to during his 21.83 years of underground coal mine employment.[9] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Mancia v. Director,* OWCP, 130 F.3d 579, 589 (3d Cir. 1997) (an ALJ may reject a medical opinion that does not adequately explain the basis for its conclusion); *Kertesz v. Crescent Hills Coals Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing

[8] To the extent Employer asserts that a preponderance of the evidence failed to establish legal pneumoconiosis, it misstates the rebuttal standard. *See* Employer's Brief at 15. As the Board previously affirmed the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption, the ALJ applied the proper burden of proof on remand in requiring Employer to rebut the presumption of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Choncek*, BRB No. 20-0398 BLA, slip op. at 5; Decision and Order on Remand at 16.

[9] Dr. Basheda testified that Claimant's mild restrictive impairment "may be related – or most likely is related to him being overweight." Employer's Exhibit 6 at 17. He also indicated Claimant's treating physicians identified an obstructive impairment "consistent with asthma" but determined this was not "occupational asthma" related to Claimant's coal dust exposure because it did not develop until recently. *Id*. at 18-20. Dr. Rosenberg diagnosed an obstructive and restrictive impairment. Employer's Exhibit 7 at 16-18. He agreed that the mild restriction he observed "could be" caused by Claimant's obesity. *Id*. at 18. In addition, he indicated that the obstructive impairment he observed was unrelated to coal dust exposure "because the scarring related to the [coal workers' pneumoconiosis] would prevent" improvement after bronchodilators on pulmonary function testing. *Id*. at 20.

court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied); Decision and Order on Remand at 16. As the ALJ provided a valid reason for discrediting their opinions, we need not address Employer's additional arguments concerning his weighing of their opinions, including that the ALJ again erred in relying on the preamble to conclude that COPD, including asthma, must be attributable to coal mine dust inhalation and therefore Claimant's asthma constitutes legal pneumoconiosis. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *Larioni*, 6 BLR at 1-1278; Decision and Order on Remand at 16, 27; Employer's Brief at 7-12.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in rejecting the opinions of Drs. Basheda and Rosenberg, we affirm his finding that Employer did not disprove legal pneumoconiosis. *See Kertesz*, 788 F.2d at 163; Decision and Order on Remand at 16.

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 27-28. Contrary to Employer's arguments, the ALJ permissibly discredited Drs. Basheda's and Rosenberg's opinions on the cause of Claimant's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to his finding.[10] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order on Remand at 27-28. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[10] Drs. Basheda and Rosenberg did not offer an explanation with respect to whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he does not have the disease.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge